

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Disqualification Appeal
of Steven Smisek

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Ann O'Reilly at 10:30 a.m. on July 9, 2012, in the Office of Administrative Hearings, 600 North Robert Street, St. Paul, MN, pursuant to a Notice and Order for Prehearing Conference and Hearing, dated March 12, 2012, and Prehearing Order, dated May 3, 2012. The record closed on the same day of the hearing, July 9, 2012.

Gail Feichtinger, Assistant Attorney General, appeared for the Minnesota Department of Human Services ("Department"). Appellant Steven Smisek ("Appellant") appeared *pro se*.

STATEMENT OF THE ISSUE

Whether the disqualification of Appellant's employment from a position involving direct contact with persons receiving services from a program licensed by the Department of Human Services should be set aside pursuant to Minn. Stat. § 245C.22, subd. 4.¹

Based upon the evidence in the hearing record, the Administrative Law Judge ("ALJ") makes the following:

FINDINGS OF FACT

1. Appellant is employed as a Security Counselor Lead at the Minnesota Sex Offender Program ("MSOP") Moose Lake Facility.²

2. MSOP provides services to individuals who have been court-ordered to receive sex offender treatment.³ MSOP clients have completed their prison sentences and are civilly committed by the courts and placed in sex offender treatment for an indeterminate period of time.⁴

¹ Minnesota Statutes herein are cited to the 2010 edition.

² Testimony of Steve Smisek.

³ Minnesota Department of Human Services website, Minnesota Sex Offender Program overview.

⁴ *Id.*

3. As an employee of MSOP, Appellant is considered an employee of a “public employer,” as defined by Minn. Stat. § 179A.03, subd. 15.⁵

4. Appellant has been employed as a Security Counselor at MSOP since approximately 2005.⁶

5. All of Appellant’s performance reviews at MSOP from 2005 to 2010 have been positive; stating that he has consistently met or exceeded performance expectations.⁷ Indeed, as recently as June 12, 2012, Appellant received a Certificate of Appreciation for his “outstanding contributions,” “hard work,” and “dedication” to MSOP⁸

6. On September 29, 2010, Appellant was promoted to the Security Counselor Lead position.⁹

7. As part of his employment, Appellant was subject to a Department background study.¹⁰

8. The background study revealed that Appellant had been convicted of misdemeanor theft in violation of Minn. Stat. § 609.52, subd. 2(1), on May 20, 2011.¹¹

9. Misdemeanor theft under Minn. Stat. § 609.52, subd. 2(1), is a disqualifying offense under Minn. Stat. § 245C.15, subd. 4.

10. Appellant’s admission of guilt and the underlying facts of the offense are not in dispute.¹² On March 22, 2011, Appellant was at a Mills Fleet Farm in Owatonna, Minnesota. Bryan Madsen, a loss prevention officer for the store, observed Appellant take two handfuls of fishing lures and conceal them in a fishing rod case.¹³ Appellant purchased the rod case but made no effort to pay for the concealed lures.¹⁴ The Appellant then left the store without paying for the lures.¹⁵ The retail value of the lures was \$276.37.¹⁶ Madsen confronted Appellant outside the store, and the Owatonna Police Department was contacted.¹⁷ Appellate was issued a citation for misdemeanor theft under Minn. Stat. § 609.52, subd. 2(1).¹⁸

⁵ Testimony of Elizabeth Owen; Minn. Stat. § 179A.03, subd. 15.

⁶ Test. of S. Smisek.

⁷ Ex. 6.

⁸ Ex. I.

⁹ Ex.6.

¹⁰ Ex. 3 and Ex. 5.

¹¹ Ex. 3.

¹² Test. of S. Smisek.

¹³ Ex. 14.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

11. On May 20, 2011, Appellant pleaded guilty to, and was convicted of, misdemeanor theft pursuant to Minn. Stat. § 609.52, subd.2(1), in Steele County District Court.¹⁹ Appellant was sentenced to 90 days of jail (all of which was stayed) and a \$500 fine (\$200 of which was stayed).²⁰ Appellant was placed on probation to court services for one (1) year on the condition that he have no further criminal offenses and cooperate/comply with court services.²¹

12. On September 30, 2011, the Department notified Appellant that due to his misdemeanor theft conviction on May 20, 2011, Appellant was disqualified from any position involving direct contact with persons receiving services from programs licensed by the Department, pursuant to Minn. Stat. § 245C.14, subd. 4.²²

13. MSOP is a program licensed by the Department.²³

14. In the position of Security Counselor Lead, Appellant has direct contact with persons receiving services from MSOP.²⁴ As part of his job duties, Appellant must monitor and check sex offenders in and out of the MSOP facility.²⁵ By checking clients in and out of the facility, Appellant has direct access to the persons receiving services from the MSOP.²⁶

15. Some of the sex offenders receiving services from MSOP are vulnerable adults who suffer from chemical dependency, mental illness, low IQs, and some developmental, emotional, educational, and physical disabilities.²⁷

16. Appellant completed his probation without violation on May 19, 2012, and has had no subsequent offenses.²⁸

17. Because Appellant's probation expired on May 19, 2012, less than seven years have passed since Appellant has been discharged from the sentence imposed.²⁹

18. Appellant suffers from attention deficit hyperactivity disorder ("ADHD") and chemical dependency issues.³⁰ Appellant takes prescription medication to treat his ADHD and anxiety.³¹ At the time of the theft offense, Appellant states that he was changing medications and this impacted his impulse control.³² Appellant takes

¹⁹ Ex. 4 and Ex. 15.

²⁰ Ex. 15.

²¹ *Id.*

²² Ex. 12.

²³ Test. of E. Owen.

²⁴ Test. of E. Owen; Test. of S. Smisek.

²⁵ Ex. J; Test. of S. Smisek.

²⁶ *Id.*

²⁷ Test. of E. Owen; Test. of S. Smisek.

²⁸ Ex. D; Test. of S. Smisek.

²⁹ *Id.* See also, Minn. Stat. § 245C.15, subd. 4.

³⁰ Ex. A, B, and C

³¹ *Id.*

³² Test. of S. Smisek.

responsibility for his actions, frankly stating, “What I did was impulsive, illegal and dumb.”³³

19. While Appellant admittedly suffers from chemical dependency issues, Appellant provided no evidence or testimony of his involvement in, or completion of, any rehabilitation or treatment programs for either chemical dependency or ADHD.³⁴ Appellant states that his management of his ADHD is an on-going struggle, but provides no information related to chemical dependency treatment or rehabilitation.³⁵

20. A 2009 conviction for possession of marijuana in a motor vehicle (a misdemeanor) and possession of drug paraphernalia (a petty misdemeanor) is consistent with Appellant’s assertion of a chemical dependency issue.³⁶ These convictions are not, however, disqualifying offenses under Minn. Stat. §§ 245C.14 and 245C.15.

21. On or about October 25, 2011, Appellant served upon the Department a Request for Reconsideration of Disqualification Due to a Criminal Offense.³⁷ Appellant’s Request for Reconsideration was timely.³⁸

22. In his Request for Reconsideration, Appellant acknowledged that the information the Department relied upon in making its disqualification decision was correct, but Appellant asserted that he did not pose a risk of harm to the persons that MSOP serves because the theft offense was a non-violent property offense and his daily work did not involve direct contact with vulnerable adults.³⁹

23. The Appellant also provided the Department with a letter from his probation officer setting forth the term and conditions of his probation, as well as a letters from medical professionals stating that Appellant suffers from ADHD, is currently taking prescription medications, and is “actively seeking other types of chemical dependency and ADHD therapy treatment options.”⁴⁰

24. As a result of Appellant’s Request for Reconsideration, Elizabeth Owen, a Staff Attorney for the Department, completed a risk of harm assessment.⁴¹ Owen considered the risk of harm factors set forth in Minn. Stat. § 245C.22, subd. 4, and determined that Appellant had failed to demonstrate that he was not a risk of harm to the persons served by MSOP.⁴²

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ex. 2.

³⁷ Ex. 8.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Exs. A, B, C, and E.

⁴¹ Ex. 7; Test. of E. Owen.

⁴² *Id.*

25. On December 21, 2011, the Department notified Appellant that based upon the Department's assessment of the risk of harm factors in Minn. Stat. § 245C.22, subd. 4, the Department determined that Appellant had failed to demonstrate that he was not a risk of harm to the persons served by the MSOP.⁴³ Accordingly, the Department did not set aside Appellant's disqualification.⁴⁴

26. In a letter dated December 21, 2011, the Department also notified the license holder, MSOP, of Appellant's disqualification and the Department's decision not to set aside the disqualification.⁴⁵ The letter advised MSOP of the Commissioner's ability to grant a time-limited variance to a license holder for a person whose disqualification has not been set aside.⁴⁶

27. Despite Appellant's good job performance reviews and even a letter of support from his direct supervisor, Eric Thomas, the license holder, MSOP, has not requested a variance from the Department under Minn. Stat. § 245C.30.⁴⁷ Variances may only be requested by the license holder.⁴⁸

28. On January 3, 2012, Appellant timely served upon the Department a request for a contested case hearing pursuant to Minn. Stat. § 245C.28, subd. 3(a).

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. This matter is properly before the Commissioner of Human Services ("Commissioner") and the Office of Administrative Hearings pursuant to Minn. Stat. §§ 245C.14, 245C.22, 245C.23, and 245C.28.

2. The Department and Appellant have complied with all applicable procedural and notice requirements under the statutes and rules.

3. The Commissioner shall disqualify an individual who is the subject of a background study from any position allowing direct contact with persons receiving services from facilities or programs licensed by the Department when a background study shows a conviction of an offense listed in Minn. Stat. § 245C.15, regardless of whether the conviction is a felony, gross misdemeanor, or misdemeanor level crime.⁴⁹

4. Misdemeanor theft under Minn. Stat. § 609.52, subd. 2(1) is a disqualifying offense under Minn. Stat. 245C.15, subd. 4.

⁴³ Ex. 10.

⁴⁴ *Id.*

⁴⁵ Ex. 11.

⁴⁶ *Id.*

⁴⁷ Test. of E. Owen; Ex. 6 and Ex. H.

⁴⁸ Minn. Stat. § 245C.30, subd. 1(c).

⁴⁹ Minn. Stat. § 245C.14, subd. 1.

5. An individual is disqualified under Minn. Stat. § 245C.14 if the individual has committed a misdemeanor-level offense under Minn. Stat. § 609.52 (theft) and less than seven years has passed since the discharge of the sentence imposed.⁵⁰

6. No individual who is disqualified following a background study may be retained in a position involving direct contact with persons served by a program or licensed facility unless the Commissioner has provided written notice stating that: (1) the individual may remain in direct contact during the period in which the individual may request reconsideration; (2) the Commissioner has set aside the individual's disqualification; or (3) the license holder has been granted a variance for the disqualified individual.⁵¹

7. "Direct Contact" is defined as "providing face-to-face care, training, supervision, counseling, consultation, or mediation assistance to persons served by the program."⁵²

8. A disqualified individual who is an employee of a public employer, as defined in Minn. Stat. § 179A.03, subd. 15, may request a contested hearing following a reconsideration decision under Minn. Stat. § 245C.23.⁵³

9. If the individual was disqualified based on a conviction or admission to any crimes listed in Minn. Stat. § 245C.15, the scope of the contested case hearing shall be limited solely to whether the individual poses a risk of harm pursuant to Minn. Stat. § 245C.22.⁵⁴

10. The Commissioner may set aside the disqualification if the Commissioner finds that the individual has submitted sufficient information to demonstrate that the individual does not pose a risk of harm to any person served by the license holder.⁵⁵

11. In determining whether a disqualification should be set aside, the Appellant has the burden of proof to demonstrate that he does not pose a risk of harm to any person served by the license holder.⁵⁶

12. To determine whether the Appellant has met his burden of proof, the Commissioner shall consider:

- (1) the nature, severity, and consequences of the event or events that led to the disqualification;
- (2) whether there is more than one disqualifying event;

⁵⁰ Minn. Stat. § 245C.15, subd. 4.

⁵¹ Minn. Stat. § 245C.14, subd. 1(b).

⁵² Minn. Stat. § 245C.02, subd. 11.

⁵³ Minn. Stat. § 245C.28, subd. 3(a).

⁵⁴ *Id.*

⁵⁵ Minn. Stat. § 245C.22, subd. 4(a).

⁵⁶ Minn. Stat. § 245C.22, subd. 4(a) and (b).

- (3) the age and vulnerability of the victim at the time of the event;
- (4) the harm suffered by the victim;
- (5) the vulnerability of the persons served by the program;
- (6) the similarity between the victim and persons served by the program;
- (7) the time elapsed without a repeat of the same or similar event;
- (8) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and
- (9) any other information relevant to reconsideration.⁵⁷

13. The Commissioner shall give preeminent weight to the safety of each person served by the license holder over the interest of the disqualified individual.⁵⁸

14. In addition, any single factor under Minn. Stat. § 245C.22, subd.4(b) may be determinative of the Commissioner's decision whether to set aside the individual's disqualification.⁵⁹

15. Upon review of a decision of the Department denying the set aside of a disqualification, the Administrative Law Judge shall consider all of the characteristics that cause the individual to be disqualified in order to determine whether the individual poses a risk of harm.⁶⁰

16. The Memorandum below is incorporated herein by reference.

Based upon the foregoing Findings of Fact and Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the decision not to set aside the disqualification of Appellant be AFFIRMED.

Dated: July 16, 2012

s/Ann O'Reilly
Ann O'Reilly
Administrative Law Judge

Reported: Digitally Recorded; No transcript prepared

⁵⁷ Minn. Stat. § 245C.22, subd. 4(b).

⁵⁸ Minn. Stat. § 245C.22, subd. 3.

⁵⁹ *Id.*

⁶⁰ Minn. Stat. § 245C.28, subd. 3(e).

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, P.O. Box 64998, St. Paul MN 55155, (651) 431-2907 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Appellant has the burden of proof to demonstrate that he does not pose a risk of harm to any person served by the license holder.⁶¹ This burden is a significant one, given Appellant's supervisory position as the Security Counselor Lead.

The Security Counselor Lead is a position of trust and security. MSOP relies upon Appellant to maintain its secured facility and ensure that its clients are constantly accounted for. Clients are not free to come and go and, rather, are closely monitored to ensure that accurate client population data is maintained at all times.⁶²

Appellant contends that he was convicted of a single, misdemeanor property offense (theft of property valued at \$276.37), and that such conviction does not create a risk of harm to the population served by MSOP.⁶³ Appellant states that the "victim" of the offense was a corporation (as opposed to an individual), and that he has now successfully completed his probation without violation or re-offending.⁶⁴ Appellant further testified that his direct contact with the MSOP population is minimal, and that his contact with vulnerable adult clients is generally supervised by other MSOP

⁶¹ Minn.Stat. § 245C.22, subd. 4(a).

⁶² Test. of S. Smisek.

⁶³ Test. of S. Smisek.

⁶⁴ Id. See also, Ex. 8 and Test. of S. Smisek.

employees.⁶⁵ Finally, Appellant presented testimony regarding the circumstances surrounding the offense; namely, his diagnosis of ADHD and a change in prescription medications around the time of the offense.⁶⁶

While Appellant provided some context for his offense and appears to have taken responsibility for his actions; given the level of trust, supervision, and responsibility associated with his position as Security Counselor Lead, Appellant has failed to satisfy his burden in showing that he does not pose a risk of harm to the clients with whom he has direct contact at MSOP.

As Security Counselor Lead, Appellant has direct contact with the MSOP client population, including those considered vulnerable adults due to mental and other disabilities. “Direct Contact” is defined in the statute as “providing face-to-face care, training, *supervision*, counseling, consultation, or mediation assistance to persons served by the program.”⁶⁷ There is no exception for minimal, infrequent, or supervised contact.

Appellant admits that he does have direct contact with MSOP clients as part of his supervisory duties of checking clients in and out of the program.⁶⁸ The Position Description for Security Counselor Lead provides that Appellant will document all new admissions and discharges; will document all client transports; and will photograph clients and issue them badges.⁶⁹ Such duties inherently require direct client contact. Although Appellant testified that his contact with vulnerable adult clients is generally in the presence of other MSOP staff members, it does not negate the fact that Appellant has direct contact with both vulnerable clients, as well as those not classified as vulnerable.

Since the date of his Request for Consideration, Appellant has provided evidence of his successful completion of probation.⁷⁰ Appellant was discharged from probation just two months ago (on May 19, 2012).⁷¹ Misdemeanor theft is an offense with a seven-year disqualification period from the date of discharge from probation.⁷² The purpose of a seven-year disqualification period is to ensure that sufficient time has passed to demonstrate rehabilitation and lack of recidivism. While Appellant had no probation violations and successfully completed his one-year probationary term, an insufficient time has elapsed since the date of the offense, conviction, and discharge from probation to demonstrate that he is not at risk of re-offending or a risk to the clients served by MSOP.

⁶⁵ Test. of S. Smisek.

⁶⁶ *Id.* See also Ex. A, B, and C.

⁶⁷ Minn. Stat. § 245C.02, subd. 11 (emphasis added).

⁶⁸ Test. of S. Smisek.

⁶⁹ Ex. J.

⁷⁰ Ex. D.

⁷¹ *Id.*

⁷² Minn. Stat. § 245C.15, subd. 4.

While Appellant has not reoffended since the date of conviction, Appellant failed to provide any evidence of the successful completion of any treatment, therapy, or rehabilitation for either of the problems that Appellant cites as the cause for his transgression (i.e., ADHD and chemical dependency). Appellant testified that at the time of the offense, he was changing prescription medications for ADHD and anxiety, and that his judgment was somewhat impaired.⁷³

Appellant submitted three letters from medical professionals indicating that Appellant suffers from ADHD and chemical dependence, and that he “is actively seeking other types of chemical dependency and ADHD therapy treatment.”⁷⁴ However, Appellant provided no evidence that he actually sought, let alone completed, any treatment or rehabilitation programs since the date of offense.

While Appellant may be better managing his ADHD through the use of new prescription medication since the date of offense, he has provided no evidence of treatment or rehabilitation for his admitted chemical dependency issues. This has relevance given Appellant’s 2009 convictions for possession of marijuana in a motor vehicle and possession of drug paraphernalia.⁷⁵ The ALJ recognizes that these are not disqualifying offenses; but because Appellant affirmatively asserted the issue of chemical dependency in this matter, and because these offenses show a pattern of disobedience of the law, the ALJ takes notice of the convictions under Minn. Stat. §§ 245C.22, subd. 4(b)(9) and 245C.28, subd. 3(e).

It is undisputed that Appellant has demonstrated good job performance and has never been subject to discipline.⁷⁶ Indeed, as recently as June 2012, Appellant was presented with a Certificate of Appreciation for his work at MSOP.⁷⁷ However, good job performance is not necessarily indicative of his risk of harm to the client population served by MSOP.

The ALJ, like the Commissioner, must give the most weight to the safety of each person served by MSOP over the interests of Appellant.⁷⁸ Theft is a crime of dishonesty and the Security Counselor Lead is a position of trust involving supervision of, and direct contact with, some vulnerable individuals. Given the short period of time that has elapsed since the date of the offense, the ALJ finds that Appellant has failed to meet his burden of proof in demonstrating that he does not pose a risk of harm to the individuals that MSOP serves. While a time-limited variance under Minn. Stat. § 245C.30 may be appropriate in this matter if MSOP requests the same, there is insufficient basis at this time to set aside the disqualification. Accordingly, the ALJ recommends that the decision to not set aside the disqualification be affirmed.

A. C. O.

⁷³ Test. of S. Smisek.

⁷⁴ Exs. A, B, and C.

⁷⁵ Ex. 2.

⁷⁶ Ex. 6 and Ex. H.

⁷⁷ Ex. I.

⁷⁸ Minn. Stat. § 245C.22, subd. 3.